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No. 02-500

IN THE
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF JOINT PETITION FOR CERTIORARI

This case is about what level of control over disposal of hazardous waste is sufficient to make a party liable as an arranger under CERCLA. Every circuit except the Ninth considers all potentially relevant indicators of control in determining whether the causal connection between the actions of a party and the disposal of hazardous waste is sufficient to make that party liable under CERCLA § 107(a)(3). In contrast, the Ninth Circuit identified and considered only a few, specific forms of control in deciding that the United States was not liable as an arranger. The Ninth Circuit simply did not consider all of the circumstances that show the United States is indeed liable as an arranger. The United States Opposition brief ("Opp.") makes the same error by failing to consider all the facts in conjunction with one another and divorcing them entirely from the unique historical context of industrial regulation during World War II.

Wartime production by the United States and private companies on its behalf left a legacy of hazardous waste which the government and private parties are still addressing sixty years later. More than $1 billion in liability for these cleanups turns on whether the government's control over industrial operations during wartime emergencies can give rise to liability under CERCLA for "otherwise arranging" for the disposal of hazardous waste. For good reason, the United States does not challenge the importance of this issue for resolving pending and future claims.[1] This case provides an

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[1] Petitioners note that, in addition to the cases cited at Pet. App. 120a-23a, there is at least one additional case pending involving a claim that the United States is liable as an arranger under CERCLA. *See United States* v. *Monsanto Chem. Co.*, No. 99-63-WLB (S.D. Ill. filed Mar. 15, 2000). Although the potential cleanup costs in *Monsanto* are unknown, the plant at issue was for years the nation's largest single manufacturer of PCBs.

excellent vehicle for this Court to clarify the meaning of "arrange" in CERCLA § 107(a)(3) and aid lower courts in deciding liability for and allocation of the costs of responding to the waste left from the war effort.

1. The Ninth Circuit's Analysis Of Arranger Liability Differs From The Approach Taken By All Other Circuits That Have Considered The Question.

Much of the difficulty in describing the Ninth Circuit's analysis stems from the court's failure to set out any applicable standard. Instead, it relied on ad hoc comparisons to cases on arranger liability from other circuits. The Ninth Circuit interpreted the Eighth Circuit's decision in *United States* v. *Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989), to stand for the proposition that arranger liability arises from ownership of the hazardous materials that are disposed of at another's facility. The court interpreted *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), to mean that arranger liability arises if a party has direct control over the disposal arrangements. Its initial conclusion that there was no arranger liability in this case was based on finding that these two, specific forms of control were not present in this case. See Pet. App. 18a, 21a.[2] The court emphasized that those two factors are determinative by citing a district court case which states that courts had only found arranger liability when a "party either was the source of the pollution or managed its disposal by the arranger." *Id.* at 21a-22a.

The Ninth Circuit's approach contrasts most starkly with the flexible approach articulated by the Eighth Circuit in *United States* v. *TIC Investment Corp.*, 68 F.3d 1082 (8th Cir.

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[2] In this Reply, Petitioners' citations to the opinions below are to their Petition No. 02-500, and citations to the factual record will be to the Lodging ("L") with this Court by Petitioners Shell Oil Company and Union Oil Company, which accompanied their Petition No. 02-506.

1995), a case which neither the Ninth Circuit nor the United States analyzed. In *TIC*, the Eighth Circuit stated that liability as an arranger under CERCLA § 107(c)(3) attaches if a party "had the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal." *Id.* at 1089. Thus, the United States's arguments that it lacked direct control over waste disposal at the McColl Site, Opp. 9, simply illustrate the inconsistency between the Ninth Circuit's focus on particular types of direct control and the recognition by other circuits that even indirect control can give rise to arranger liability. See *TIC*, 68 F.3d at 1089, 1090 n.7; *Florida Power & Light Co.* v. *Allis-Chambers Corp.*, 893 F.2d 1313, 1318 (11th Cir. 1990) (a party may be liable as an arranger even though it "does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed").

A careful reading of the Ninth Circuit's opinion in this case shows that it narrowed substantially the analysis for arranger liability that other circuits apply. Moreover, the totality of the circumstances in this case shows that the United States exercised extensive and pervasive control over aviation gasoline ("avgas") production and controlled the available means for disposing of waste generated from that process.

2. The United States Sanitizes The Historical Context In Which The Acid Waste Disposal Took Place, Attempting To Give The Impression That Refining Petroleum During World War II Was "Business As Usual."

The United States fails to synthesize how the various pieces of evidence interact with the backdrop of pervasive and unprecedented control present during the war. Notwithstanding overwhelming historical evidence to the contrary, the United States pretends that its procurement of avgas from

the Oil Companies[3] during World War II was an ordinary, arms-length contractual relationship in a conventional free market. Nothing could be further from the truth.

The general counsel of the War Production Board ("WPB") and former assistant general counsel wrote an article in 1944 that describes the wartime controls that ensured the production of items needed for military use by the United States and its Allies. John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies & Procedures*, 13 Geo. Wash. L. Rev. 1 (1944) (lodged with the Court together with this Reply Brief ("Pet. Reply L.")). Their article details the laws and orders that made the WPB's power over industrial production "virtually unconditioned and unlimited in extent." *Id.* at 19.

To prepare for war, the authors explain that "at least two basic powers were urgently needed by the Federal Government, (1) the power to control and to direct the distribution of scarce materials and products of all kinds ... and (2) the power to allocate the use of the nation's productive facilities." Pet. Reply L. 7. Shortly after President Roosevelt declared a national emergency in 1939, Congress enacted a defense priorities system to allocate scarce but essential raw materials to companies that agreed to manufacture goods for the United States military. Priorities Statute, ch. 440, 54 Stat. 676 (1940); see Pet. Reply L. 8. Congress then passed the Selective Training and Service Act of 1940, ch. 720, § 9, 54 Stat. 885, 892, establishing penalties for any company that refused to manufacture items for the military, including seizure of plants, fines, and imprisonment for company officials. See Pet. Reply L. 9-10. A subsequent amendment to the Priorities Statute, ch. 157, 55 Stat. 236 (1941), gave "the executive one of the most, if not the most sweeping grant of authority in our history." Pet. Reply L. 10. And under the Second War

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[3] Petitioners Atlantic Richfield Company, Texaco, Inc., Shell Oil Company and Union Oil Company.

Powers Act, ch. 199, 56 Stat. 176 (1942), "the power to allocate materials was expanded to include a similar power to allocate facilities, an authority which has since been widely exercised." Pet. Reply L. 12.

Under these laws, the parties agree that the United States had the "authority to place obligatory product orders" for avgas, which a refinery had to fill if it had the technical capacity to do so. See Stips. 43, 200 (L 13-14, 46). The parties also agree that the United States controlled priority allocations for scarce materials that refineries needed to stay in operation, and made decisions that approved or denied refinery requests for such items.[4] The United States could shut down operations at a particular refinery by denying its request for a priority right to obtain raw materials, see *infra* at 6, and it could issue direct orders to limit or stop production of "nonessential" items at a refinery. See Stips. 82-88 (L 21). Refineries that failed to comply with orders were subject to seizure and criminal penalties. See Stips. 43, 59 (L 13-14, 16).

This coercive regime fundamentally changed the terms of national industrial production. The United States admitted it had the power to compel a refinery to maximize the production of avgas (if it had the capacity to produce), and the United States was prepared to use its power to maintain maximum production at almost any cost. See Stips. 200-204 (L 46-47); L 171-72. Moreover, the United States was fully aware of the environmental consequences of this increase in production, recognizing that the burgeoning "production of aviation gasoline would increase the amount of spent alkylation and acid sludge produced." Stip. 338 (L 76). Monroe Spaght of the Shell Oil Company testified that, although he had raised concerns about how to dispose of acid sludge with

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[4] *See* Stips. 55 (L 15 – raw materials), 66 (L 18 – acid and construction materials), 86-88, 212, 237 (L 21, 49, 57-58 – avgas components), 128 (L 31 – allocation of crude oil to refineries making avgas).

the government regulatory committees, the United States would not allow operations to be shut down. See L 177. He stated that "with all of the things that had been done through the years to increase aviation gasoline production, you would not let a thing like this acid problem stop you. That would be the last thing that would be allowed." *Id.* at 178. When asked if those were his instructions from the government, he replied, "[a]bsolutely." *Id.*

Overarching government control over wartime avgas production was confirmed at trial by J. Howard Marshall, general counsel for the Petroleum Administration for War ("PAW"). He testified that if a refiner had come to the PAW seeking to stop producing avgas because of its hazardous by-products, he would have "[t]old him to make it anyway." L 175. Furthermore, Mr. Marshall testified that if a refiner had sought to opt out of the avgas program, the PAW "would have shut him down; take away his materials and supplies. You didn't have to take him to court, for which I was fortunate. I just took away his materials and priorities. Usually you couldn't operate a week without it." *Id.* at 173.

Control exists by virtue of one having power over another, whether that power is exercised or not. The government had comprehensive power to seize factories, impose criminal sanctions, or shut down companies by issuing orders denying them access to scarce materials. See Pet. Reply L. 12, 47-48, 51. Respondent's protests that it rarely exercised its power to seize refineries are irrelevant to whether or not it exercised control. See Opp. 5 & n.5, 17 n.13. It is no wonder that companies complied with the government orders under these circumstances.[5]

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[5] In light of these stipulations and the government's total control over industrial production during World War II, the government's statement that the United States controlled the specifications, quantities, delivery, and price of avgas "only in the sense that every party controls the terms on which it chooses to contract" is a profound distortion of the facts and the record. Opp. 17; *see* Stips. 119, 221 (L 28, 51-52)

3. The Evidence Is Equally Clear That The United States Exercised Substantial Control Over The Means For Disposal Of Acid Waste During World War II.

Through its pervasive control over resource allocation during World War II, the United States controlled total avgas production and then restricted the alternatives available for disposal of the huge volumes of acid waste that resulted from avgas production. As the United States acknowledges, it is irrefutable that all industries seeking to use scarce materials during World War II were required to obtain approval from the WPB. See Opp. 10. All WPB decisions regarding construction of waste reprocessing facilities, waste storage tanks, new tank cars, or the use of existing tank cars were made pursuant to the WPB's powers to allocate scarce resources for the war effort. See Stips. 340-342 (L 76).

Even in 1942, it was clear that the Oil Companies viewed dumping to land as a "last resort," used when access to other options was unavailable. Stips. 489-490 (L 125-27). When the United States withheld access to scarce resources needed to store, reuse, or reprocess all avgas waste, dumping became the only available option.[6]

Petitioners exhausted their ability to store acid waste at their plants during the war.[7] The WPB knew that storage capacity was limited, and that local facilities for reprocessing

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[6] The United States unfairly conflates burning and dumping in describing the means by which the Oil Companies disposed of acid waste before, during, and after the war. *See* Opp. 8, 10, 11. By using the terms together, Petitioner cites to fact stipulations that involve burning alone as support for its "facts" about acid waste dumping. *See* Stips. 506-509 (L 131). Burning of acid waste is not an issue in this case.

[7] For example, annual acid use increased five-fold during the war at the Shell refinery. Only 10% of the acid is consumed during production, and the other 90% must leave the refinery after use. *See* Stips. 319-322 (L 72-73).

the waste into fresh acid were insufficient to handle all the Oil Companies' waste. See Stips. 373-374 (L 83-84). Nevertheless, the WPB rejected a Texaco proposal to build a reprocessing facility for acid waste, see Stips. 379-381 (L 85-87), and it rejected a Shell Oil proposal to build a similar facility in Texas, noting that waste processing plants would tie up strategic materials and equipment needed for other wartime priorities. See L 235-37. The WPB also failed to make tank cars available to transport the waste to facilities that could reuse it in fertilizer manufacture.[8] After helping petitioners locate a tank to store spent acid at the end of the war, the WPB failed to locate or allocate priorities needed to store the remaining acid sludge waste.[9]

The above evidence is missing from the United States's Opposition brief, and the United States takes the same liberties with the factual record regarding waste disposal alternatives as the Ninth Circuit did. After the allocation trial, the district court declared that it was "convinced that the Oil

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[8] Richard Smith, the WPB official sent to monitor acid waste, noted that the ability to ship acid sludge to a fertilizer factory for reuse was dependent on the availability of lead-lined tank cars to transport the waste. He testified that "the immediate cause of Union's dumping was a shortage of tank cars," Stip. 402 (L 93); *see* Stip. 395 (L 92), and that Shell apparently dumped for the same reason. *See* L 239; *see also id.* at 237 (describing the shortage of tank cars to carry fresh acid or acid waste). The parties agreed there was a shortage of tank cars during the war. *See* Stips. 417-419 (L 96). The United States gave tank car priority to the transport of fresh acid needed for military production, not the transport of acid waste.

[9] The United States claims that the "dumping ended after petitioners reached agreement with another company for temporary use of a storage tank," a transaction that WPB and PAW helped arrange. Opp. 10 (citing Stips. 366-371 (L 81-83)). In fact, the tank was not available until April 1945, and it only stored spent acid, not sludge. Since petitioners continued to reuse spent acid wherever possible in their refineries, they continued to generate acid sludge that required some form of disposal. *See* Stips. 369-371, 375 (L 82-83, 84). The WPB and PAW did not locate any other storage options.

Companies had no reasonable recourse to on-land dumping of the sludge due to the conduct of the WPB." Pet. App. 76a. The trial court's finding, based on stipulated facts and trial testimony, is amply supported.[10]

The United States scoffs that Petitioners are arguing that it is liable for the disposal of all waste produced by a closely-regulated industry. See Opp. 19. This is not the argument at all. Petitioners contend that the United States is liable for the disposal of waste under wartime controls where the United States *both* drove the refineries to increase avgas production, resulting in acid waste at levels that quickly exceeded the refineries' pre-war capabilities to handle, *and* exercised its unique wartime powers to foreclose the refineries' ability to arrange more benign means of disposal. If the Ninth Circuit had looked fairly at the sum of all the facts in this case, it would have held that the United States arranged for the disposal of hazardous waste.

4. The United States Unfairly Characterizes The Oil Companies' Motives In Becoming Involved In Avgas Production.

The United States unfairly impugns the Oil Companies' motives for producing avgas as part of the war effort. See Opp. 6-7, 16-17, 19. The Oil Companies answered President Roosevelt's call, along with the rest of the nation, to commit themselves to the cause of freedom in the effort to defeat the Axis nations. The general counsel for the WPB and his former assistant lauded companies that wholeheartedly threw themselves into the war effort, writing that "[t]he conversion

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[10] Although Respondent twice quotes the court of appeals's remarkable, contrary conclusion that "undisputed facts" suggest otherwise, Opp. 15, 18, the court of appeals was not entitled "to reverse the findings of the trier of fact simply because it [was] convinced that it would have decided the case differently." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The Ninth Circuit did not even purport to engage in "clearly erroneous" review of the facts.

of American industry from civilian to war production is an achievement in which American businessmen may take justifiable pride." Pet. Reply L. 4.

The United States's characterization of the Oil Companies as having solely economic motives for their involvement in avgas production verges on insulting, particularly because this nation could not have defeated Japan and Germany without the Oil Companies' efforts six decades ago. Petitioners do not dispute that they entered into voluntary contracts for avgas production, nor that they were willing participants in the war effort. Nor do Petitioners dispute their own CERCLA liability for the McColl Site. But they do contend that the overarching economic controls developed by the United States during the war became something no contractor reasonably could have envisioned before the war. Subsequent decisions of the immensely-powerful regulatory agencies that not only pressed the refineries to produce as much avgas as possible (and hence more waste than they could handle) but also withheld from the refiners the means to dispose of waste without dumping make the United States liable under CERCLA § 107(a)(3). Justice requires that the United States shoulder its fair share of the environmental costs of prosecuting the war.

CONCLUSION

For the reasons set forth in the Joint Petition and herein, the joint petition for a writ of certiorari should be granted.

Respectfully submitted,

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